Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-473

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11 pp

TABLE OF CONTENTS

		Page
A.	The court of appeals' decision is inconsistent with this Court's precedents	2
B.	The decision below conflicts with decisions of other courts of appeals	5
C.	The court of appeals improperly suppressed evidence	6
D.	The court of appeals' decision creates significant uncertainty	7

TABLE OF AUTHORITIES

Cases:

Nix v. *Williams*, 467 U.S. 431 (1984)	7
Segura v. *United States*, 468 U.S. 796 (1984)	7
United States v. *Chavez-Miranda*, 306 F.3d 973 (9th Cir. 2002), petition for cert. pending No. 02-8332	5, 6
United States v. *Garcia*, 983 F.2d 1160 (1st Cir. 1993)	6
United States v. *Jones*, 133 F.3d 358 (5th Cir.), cert. denied, 523 U.S. 1144 (1998)	6
United States v. *Langford*, No. 02-1167, (2002 WL 31890721) (7th Cir. 2002) (314 F.3d 892)	7
United States v. *Lucht*, 18 F.3d 541 (8th Cir.), cert. denied, 513 U.S. 949 (1994)	6
United States v. *Ramirez*, 523 U.S. 65 (1998)	2, 4
United States v. *Spriggs*, 996 F.2d 320 (D.C. Cir.), cert. denied, 510 U.S. 938 (1993)	6
Wilson v. *Arkansas*, 514 U.S. 927 (1995)	2, 3

Constitution and statute:	Page
U.S. Const. Amend. IV	2, 4
18 U.S.C. 3109	3, 4

In the Supreme Court of the United States

No. 02-473

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent has provided no persuasive reason for this Court to leave unreviewed the Ninth Circuit's unprecedented decision adopting a complex, four-part matrix for determining how long officers must wait, after knocking and announcing their presence and receiving no response, before they may enter a residence to execute a valid search warrant. Nor has respondent explained how the Ninth Circuit's decision in this case, which held that the officers' 15- to 20-second delay after knocking and announcing was unreasonable, can be reconciled with numerous decisions of other courts of appeals that, as the Ninth Circuit itself recently recognized, have upheld forcible entries under similar (or less compelling) circumstances.

Instead, respondent concedes that the officers went to his small apartment at 2 p.m. on a weekday to execute a valid search warrant for drugs, without knowing whether anyone was in the apartment at the time; "knocked loudly and announced 'Police, search warrant' in a loud authoritative tone"; did not hear any response; and waited at least 15-20 seconds before forcibly entering the apartment. Br. in Opp. 3. He also acknowledges that he was in the shower at the time and did not hear the officers knock and announce. *Ibid.* Under such circumstances, there can be no doubt that the officers acted reasonably and that the evidence they obtained during the search of the premises should not be suppressed. The Ninth Circuit's decision to the contrary is inconsistent with this Court's precedents, conflicts with numerous decisions of other courts of appeals, and creates significant uncertainty in a recurring aspect of police practice. This Court's review is therefore warranted.

A. The Court Of Appeals' Decision Is Inconsistent With This Court's Precedents

As explained in the petition for certiorari (Pet. 8-10), the Ninth Circuit's inflexible, complex, and confusing four-part categorical scheme is inconsistent with this Court's longstanding recognition that the Fourth Amendment does not "mandate a rigid rule of announcement," *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995), and that the "general touchstone of reasonableness * * * governs the method of execution of the warrant." *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998). The Ninth Circuit's categorical approach disregards the myriad factual circumstances and dangers confronting officers executing warrants, and in a variety of circumstances would reduce the knock-and-

announce requirement to a "senseless ceremony," *Wilson*, 514 U.S. at 936. It also improperly elevates certain factors, such as the destruction of property, which has little or no bearing on the reasonableness of the officers' entry, while ignoring or minimizing other, highly relevant factors, such as the real risk that respondent would try to destroy evidence (by, for example, flushing the drugs down the shower or toilet). See Pet. 9-10.

Respondent attempts to characterize the Ninth Circuit's categorical scheme as a simple application of the "totality of the circumstances" standard that has long been applicable to challenges to the execution of a search warrant. Br. in Opp. 4-5, 7-8. According to respondent, the court of appeals' four-part matrix "was merely an analytical distillation of cases" interpreting 18 U.S.C. 3109 and does not require "a different lapse of time" for each category it defines. Br. in Opp. 7, 4.

That reading of the opinion below is mistaken. By its terms, for example, the Ninth Circuit's formula would require that, absent exigent circumstances, officers must allow for "a lapse of a significant amount of time" before making a *non-forcible* entry. Where, however, that same entry would require *force*, and therefore some destruction of property, the officers must allow "an even more substantial amount of time" after knocking and announcing. Pet. App. 5a-6a.

Respondent also mistakenly asserts (Br. in Opp. 18) that the United States is seeking to frustrate the totality-of-the-circumstances test by advocating "a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock-and-announcement statute." To the contrary, the United States seeks this Court's review precisely because the Ninth Circuit's scheme *lacks* the flexibility vital to the proper

application of the totality-of-the-circumstances test, fails to take into account the full range of factual circumstances facing law enforcement officers, and places undue reliance on the destruction of property, which has little or no bearing on the reasonableness of the officers' entry. In any event, respondent cannot use the flexibility of the totality-of-the-circumstances analysis to justify the Ninth Circuit's plainly erroneous holding that a delay of 15-20 after knocking and announcing was unreasonable under the circumstances of this case.

By making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage, the court of appeals' approach is also plainly at odds with this Court's holding in *Ramirez* that the reasonableness of a no-knock entry "depends in no way on whether police must destroy property in order to enter." 523 U.S. at 71. It is no answer to argue, as respondent does (Br. in Opp. 8-11), that *Ramirez* involved a no-knock entry and therefore has no bearing on the relevance of property damage to the reasonableness of an entry where the officers have knocked and announced their presence. *Ramirez* reflects a general principle that the need to damage property to effectuate an entry to execute a search warrant should not be part of the analysis of determining whether the entry itself was reasonable and whether evidence should be suppressed. Instead, the proper inquiries are whether admittance has been effectively refused and whether other law enforcement needs render prompt entry reasonable. See Pet. 11-12. The Ninth Circuit's decision below engrafts a rigid property-destruction limitation onto the knock-and-announce requirement of the Fourth Amendment and 18 U.S.C. 3109, and it does so without even citing

Ramirez. That aspect of the decision below, standing alone, warrants this Court's review.

B. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

Respondent's attempt to reconcile the Ninth Circuit's holding in this case with those of other courts of appeals, which have upheld forcible entries involving comparable timing in similar factual circumstances, is unavailing. As respondent concedes, the officers in this case were executing a valid warrant for drugs during the middle of the afternoon at an apartment they knew to be quite small and had probable cause to believe contained readily disposable drugs that respondent was selling from the premises. They knocked loudly and announced their purpose and waited at least 15-20 seconds before forcibly entering respondent's apartment. Br. in Opp. 2-3; Pet. App. 14a. As the cases discussed in the petition for certiorari demonstrate (Pet. 12-15), it is beyond dispute that the entry in this case would have been upheld in many other circuits.

Indeed, the Ninth Circuit itself has candidly acknowledged that its decision in this case cannot be reconciled with either the Ninth Circuit's own prior decisions or the decisions of other courts of appeals, all of which have upheld the constitutionality of forcible entries where the officers waited 10 to 20 seconds after knocking and announcing. *United States* v. *Chavez-Miranda*, 306 F.3d 973, 981-982 n.7 (2002) ("*Banks* appears to be a departure from our prior decisions. As noted by the trial court, we have found a 10 to 20 second wait to be reasonable in similar circumstances, albeit when the police heard sounds after the knock and announcement. * * * Several other circuits have upheld similar waits even without noise being heard."),

petition for cert. pending, No. 02-8332 (filed Dec. 30, 2002). Specifically, the Ninth Circuit in *Chavez-Miranda* noted that its decision in this case conflicted, *inter alia*, with the First Circuit's decision in *United States* v. *Garcia*, 983 F.2d 1160, 1168 (1993), the Fifth Circuit's decision in *United States* v. *Jones*, 133 F.3d 358, 361-362, cert. denied, 523 U.S. 1144 (1998), the Eighth Circuit's decision in *United States* v. *Lucht*, 18 F.3d 541, 548, 549, cert. denied, 513 U.S. 949 (1994), and the D.C. Circuit's decision in *United States* v. *Spriggs*, 996 F.2d 320, 323, cert. denied, 510 U.S. 938 (1993), all of which were discussed in the petition for certiorari (Pet. 12-14. See *Chavez-Miranda*, 306 F.3d at 981-982 n.7. The Ninth Circuit nonetheless denied the government's petition for rehearing en banc in this case. Pet. App. 33a-34a.

Respondent's attempts to explain away these conflicting cases on their facts are unpersuasive. Frequently, for example, respondent relies on facts, such as the number of occupants and whether any occupant was in the shower or was otherwise "indisposed," that were unknown to the officers at the time they decided to forcibly enter the residence. See Br. in Opp. 12-14. In any event, as the Ninth Circuit itself has acknowledged, the reasoning of the other circuits' cases leaves no doubt that those circuits would have upheld the entry in this case as reasonable. See Pet. 12-15.

C. The Court Of Appeals Improperly Suppressed Evidence

Respondent's attempt to defend the Ninth Circuit's application of the exclusionary rule under the circumstances of this case is equally unpersuasive. As the dissent below emphasized (Pet. App. 14a), it is clear under the facts of this case that the events would not

have unfolded any differently had the officers waited longer before entering. Respondent does not dispute that he was showering when the officers knocked at his door and therefore did not hear them knock and announce. Accordingly, even if the officers had waited longer or knocked again before entering, respondent still would not have heard them and so still would not have admitted them to execute the warrant. Because the officers would thus have forcibly entered respondent's apartment and obtained the same evidence under the warrant-authorized search regardless of the violation found by the court of appeals, that supposed violation did not in any way harm respondent's property or privacy interests. As this Court explained in *Nix* v. *Williams*, 467 U.S. 431, 443 (1984), "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." See *Segura* v. *United States*, 468 U.S. 796, 814 (1984); Pet. 15-17; see also *United States* v. *Langford*, No. 02-1167, 2002 WL 31890721, at *2-*3 (7th Cir. Dec. 31, 2002) (314 F.3d 892) (holding that the violation of the knock-and-announce rule in executing a valid search warrant "does not authorize exclusion of evidence seized pursuant to the ensuing search," and citing the Ninth Circuit's opinion in this case as a conflicting decision).

D. The Court of Appeals' Decision Creates Significant Uncertainty

The petition demonstrated (Pet. 17-18) that the Ninth Circuit's complex, four-part categorical scheme threatens to complicate and confuse the procedures for

executing search warrants and to impose unnecessary and unacceptable risks on law enforcement personnel charged with applying it. Respondent has not shown otherwise. Officers engaged in front-line law enforcement activity often must make difficult, on-the-spot judgments under unclear and dangerous circumstances. Under the Ninth Circuit's scheme, those officers must now pause to make complicated calculations of how much property will likely be destroyed to effect an entry, and how specific are certain exigencies that prompt the entry. Even then, the Ninth Circuit's scheme provides officers no guidance about how much longer they must wait in a case such as this.

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

FEBRUARY 2003